Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Restoring Internet Freedom	)	WC Docket No. 17-108
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COMMENTS OF THE COMPUTING TECHNOLOGY INDUSTRY ASSOCIATION (COMPTIA)

I. Introduction and Summary

The Computing Technology Industry Association (CompTIA) is a non-profit trade association serving as the voice of the information technology industry. With approximately 2,000 member companies, 3,000 academic and training partners and nearly 2 million IT certifications issued, CompTIA is dedicated to advancing industry growth through educational programs, market research, networking events, professional certifications and public policy advocacy.

CompTIA's membership consists of companies across the tech industry, from ISPs to edge providers to equipment manufacturers and everything in between. We believe that the internet should be a place where all businesses, regardless of size, can compete with one another on a level playing field. Consumers, thus, should be able to access whatever legal online content they want without worrying that their ISP might block or slow down that content. The FCC's open internet rules have helped preserve this landscape over the last several years, and the Commission should retain strong rules regardless of broadband internet access service's (BIAS) classification. Strong open internet rules will help promote innovation and preserve consumer choice online.

CompTIA has supported an open internet for many years, and filed comments (under the TechAmerica name) in the FCC's 2014 proceeding in which we supported open internet rules under Sec. 706 of the Communications Act,[1] seeing that as the best path forward for the Commission at the time. However, we also noted in our comments that, ultimately, legislation would be necessary to achieve an ideal outcome,[2] and we still believe that to be the case. CompTIA has continued to support net neutrality legislation, even after the Commission released its 2015 Open Internet Order, to provide the necessary certainty for the industry. But until

[1] TechAmerica Comments, GN Docket No. 14-28 (2014).
[2] *Id.* at 3.

Congress acts, the FCC needs to have rules in place to prevent blocking, throttling and paid prioritization.

The Commission indicated in its NPRM that the primary purpose of this rulemaking is to make BIAS an information service again[3], as it was prior to 2015. CompTIA believes that BIAS can be properly classified as either a telecommunications service or an information service under the law, and notes that there are positives and negatives to either approach. However, should the Commission decide to reclassify BIAS as an information service, it should pass new rules preventing blocking, throttling and paid prioritization.

Section II of these comments will discuss the importance of an open internet and why the FCC needs rules to preserve it. Section III will evaluate the Commission's options for classifying BIAS, and Section IV will look at how the FCC can pass new open internet rules if it chooses to reclassify BIAS.

II. The Need for Open Internet Rules

A. The Importance of Internet Openness

The internet, since its inception, has been a place where a great idea and a broadband connection can create the next Fortune 500 company almost overnight. The internet's openness has fostered an incredible environment for innovation to flourish, and it's essential that the next great idea should have the same opportunity given to all the ideas that came before it. The next big app or website shouldn't have to worry about paying an ISP to gain access to its customers.

The reality of broadband in the U.S. is that most Americans simply do not have a choice when it comes to broadband providers,[4] and thus an ISPs' ability to block or throttle content could completely cut off its customers' ability to access that content or degrade it to the point of uselessness. For that reason alone, the FCC should retain rules preventing ISPs from blocking and throttling content. Fortunately, it appears that rules preventing ISPs from blocking and throttling content have near-unanimous support these days, even from ISPs themselves.[5] There is thus no reason the Commission shouldn't retain these rules.

No-blocking and no-throttling rules, on their own, aren't enough to ensure an open internet, however. The Commission also needs rules to prevent ISPs from harming consumers and engaging in anticompetitive behavior through commercial arrangements with edge providers.

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[3] *In re* Restoring Internet Freedom, WC Docket No. 17-108, Notice of Proposed Rulemaking, para. 24 (2017) ("Restoring Internet Freedom NPRM").

[4] *In re* Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996 as Amended by the Broadband Data Improvement Act, GN Docket No. 15-191, 2016 Broadband Progress Report, para. 86 (2016) ("2016 Broadband Progress Report"), "38 percent of Americans have more than one option for 25 Mbps/3 Mbps fixed broadband service."

[5] *See e.g.* David L. Cohen, Comcast Supports Net Neutrality on the Internet Day of Action (July 12, 2017), http://corporate.comcast.com/comcast-voices/on-the-internet-day-of-action-comcast-supports-net-neutrality; *see also* Bob Quinn, Why We're Joining the 'Day of Action' in Support of an Open Internet (July 11, 2017), https://www.attpublicpolicy.com/open-internet/why-were-joining-the-day-of-action-in-support-of-an-open-internet/.

Paid prioritization, for example, is not inherently bad, but prioritization arrangements between ISPs and edge providers could be used in such a way as to harm competition and consumer choice. The FCC should thus retain rules to ensure that these sorts of commercial arrangements, if allowed, are commercially reasonable and promote competition.

B. Other Regulatory Approaches to Preserve Internet Openness Fall Short

Our members have expressed concern about proposals that would eliminate the open internet rules and instead have the FTC use its authority to regulate ISPs under antitrust regulations. First, compared to the FCC, the FTC is inexperienced in regulation in this space and does not have the same level of expertise that the FCC possesses. Second, and perhaps more problematic, antitrust laws may not cover the extent of ISP behavior that the open internet rules are meant to govern.[6] The Supreme Court's *Trinko*[7] and *linkLINE*[8] decisions have made it tougher to succeed in antitrust cases premised on unilateral refusals to deal and the essential facilities doctrine, the two most likely legal theories under which the FTC could pursue an open internet violation. The decisions in these cases suggest that slowing an edge provider's content down to cripplingly slow speeds may not qualify as a unilateral refusal to deal or violate the essential facilities doctrine under antitrust law.

If the Commission does away with the open internet rules completely, we're also likely to see several states attempt to pass net neutrality legislation, similar to what transpired in the wake of the Congressional Review Act ("CRA") overturning the Commission's privacy rules. State-by-state open internet rules would create a compliance nightmare for ISPs, especially given that internet traffic isn't bound by state boundaries. Even worse, like the FTC, state governments don't have the technical expertise the FCC possesses to properly formulate and enforce such rules. Retaining rules governing blocking, throttling and paid prioritization would help prevent such a regulatory landscape from occurring.

For all of the reasons above, the FCC must retain rules to preserve an open internet. Removing the rules completely would simply prove too great a risk to the future of innovation, and the regulatory alternatives would not provide customers and edge providers the necessary protections.

III. The Classification of BIAS

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[6] See J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, *Neutral on Internet Neutrality: Should There Be a Role for the Federal Trade Commission?* Remarks before the Global Forum 2011: Vision for the Digital Future (Nov. 7, 2011), http://www.ftc.gov/sites/default/files/documents/public_statements/neutral-internet-neutrality-should-there-be-role-federal-trade-commission/111107globalforum.pdf ("Claims of monopolization and attempted monopolization based on unilateral refusals to deal or the essential facilities doctrine appear unlikely to succeed after the U.S. Supreme Court's decisions in *Verizon Communications Inc. v. Trinko* and *Pacific Bell Telephone Company, Inc. v. linkLINE Communications, Inc.")*.

[7] Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 410 (2004).

[8] Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 555 U.S. 438, 448 (2009).

Through a series of orders from 2002-2007, the Commission gradually classified cable,[9] wireline[10] and wireless broadband[11] as information services, a classification BIAS maintained until the 2015 Title II Order. The broadband industry flourished over this stretch,[12] and the internet remained open despite having legally-binding net neutrality rules in place for less than three of those years. In 2015, the FCC reclassified BIAS as a telecommunications service in an effort to find solid legal footing for open internet rules. CompTIA had concerns with the FCC taking this approach for a variety of reasons, but as we have seen over the last two years, the tech industry has continued to prosper.[13]

The evidence has shown that the tech industry can thrive and the internet can remain open regardless of whether BIAS is classified as an information service or a telecommunications service. There are benefits and drawbacks to both classifications, but CompTIA would support the FCC's decision to reclassify broadband as an information service as long as it retains open internet rules.

When the Communications Act was updated in 1996, Congress did not specifically address BIAS. This omission left the Commission to try to shoehorn BIAS into one of the Act's definitions after the fact, either as a telecommunications service, or as an information service. Two different court decisions have held that the Communications Act is ambiguous as to broadband's legal classification.[14] And those same court decisions have found that the FCC could reasonably classify broadband as either an information service or a telecommunications service if properly justified.

There is sound legal grounding for either interpretation of the statute, and thus the FCC can determine which classification it believes is appropriate. Therefore there's no "correct" answer as to its proper legal classification, and there is legitimate justification for either. Both the information and telecommunications service classifications for BIAS have benefits and drawbacks, but until Congress passes legislation providing another path forward, BIAS has to reside in one of those two buckets.

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[9] *See* Inquiry Concerning High-Speed Access to the Internet Over Cable & Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities, GN Docket No. 00-185, CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002).

[10] *See* Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities et al., CC Docket Nos. 02-33, 01-337, 95-20, 98-10, WC Docket Nos. 04-242, 05-271, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005).

[11] *See* Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks, Declaratory Ruling, 22 FCC Rcd 5901, (2007).

[12] *See* Restoring Internet Freedom NRPM, para. 23 (2017).

[13] *See* CompTIA, Cyberstates 2017: The Definitive National, State and City Analysis of the U.S. Tech Industry and Tech Workforce, 9, http://www.cyberstates.org/, "U.S. tech sector employment totaled an estimated 6.9 million in 2016, an increase of 182,220 workers from 6.7 million in 2015. Tech industry employment grew an estimated 2.7 percent year-over-year."

[14] *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005); *see also* United States Telecom Ass'n v. FCC, 825 F.3d 674 (D.C. Cir 2016).

A. BIAS as a Telecommunications Service

We have heard two primary concerns from our members regarding broadband's current classification as a telecommunications service. The first is that Title II regulations place a disproportionately large compliance burden on small ISPs and new entrants into the market. The record is full of evidence showing that the Title II order has harmed small ISPs, forcing them to divert a larger percentage of their revenue to legal compliance and deterring them from taking financial risks.[15] Further, it could be deterring new start-ups from entering the ISP market for these same reasons.

The second threat of Title II is the potential for a future FCC to decide not to forbear from some of the sections that the Commission has thus far chosen not to apply to ISPs. Most notable among them is the ability to regulate prices, which likely *would* lead directly to a downturn in network investment.

However, the FCC would not have been able to pass the net neutrality rules it currently has in place without broadband's current telecommunications service classification. The DC circuit made it abundantly clear in their *Verizon* decision that imposing the rules, written as they are, on an information service violates the Communications Act because it amounts to treating an information service as common carriage.[16] That's not to say that the FCC couldn't have passed *any* net neutrality rules if BIAS was classified as an information service, though. If the Commission chooses to reclassify broadband back to an information service, there is still a path forward for net neutrality.

B. BIAS as an Information Service

The information service classification for BIAS isn't perfect either, but it does provide some benefits beyond resolving industry concerns over Title II. Primarily, reclassification would return authority for the oversight of ISPs' data security and privacy practices to the FTC, who held that authority prior to the Title II Order. Earlier this year, Congress used the CRA to overturn the ISP privacy rules that the FCC passed last Fall. While the FCC still retains authority over ISPs' privacy and data security practices under Secs. 222 and 201 of the Communications Act, the CRA prevents the FCC from passing substantially similar privacy rules in the future.[17] While the Commission is not completely forbidden from passing new rules, there is no legal precedent addressing how exactly the FCC can proceed in terms of privacy rules.

This environment has created a perceived vacuum of authority during which at least 21 states have attempted to pass 45 ISP privacy-related laws in recent months.[18] Returning authority to the FTC to regulate in this space would help allay the fears of those who have misunderstood the law and believe that ISPs' privacy and data security practices are no longer regulated. More

[15] *See* Restoring Internet Freedom NPRM, para 47-48 (2017).
[16] Verizon v. FCC, 740 F.3d 623, 655–58 (D.C. Cir. 2014) ("Verizon").
[17] 5 U.S.C. §801(b)(2).
[18] National Conference of State Legislators, Privacy Legislation Related to Internet Service Providers (June 19, 2017), http://www.ncsl.org/research/telecommunications-and-information-technology/privacy-legislation-related-to-internet-service-providers.aspx.

importantly, it would also mean that the entire tech industry would once again be regulated by the same regulator under the same set of privacy and data security rules.

The information service classification, however, does place limits on the type of open internet rules that the Commission can pass. The FCC couldn't pass the exact rules it has in place today, but it could pass rules that would provide similar protections for both consumers and competition online.

Ideally, Congress will pass legislation to provide a legal classification for BIAS that fits better than either telecommunications or information service, given the positives and negatives of both. Until Congress acts, CompTIA will support the FCC's classification decision as long as it retains rules preventing blocking, throttling and paid prioritization.

IV. The FCC's Options for New Open Internet Rules

While the DC Circuit overturned the FCC's no-blocking and no-discrimination rules under Sec. 706 of the Telecommunications Act, it did not foreclose the Commission's ability to pass new such rules in the future, even if BIAS remained an information service. In fact, the court even provided a blueprint for the FCC to follow should they choose to go that route.[19] The FCC's initial NPRM in 2014 actually indicated plans to follow that blueprint before the Commission decided instead to reclassify BIAS as a telecommunications service. CompTIA supported the FCC's proposal in 2014,[20] and we believe it is still creates a viable path towards rules governing blocking, throttling and paid prioritization should the FCC choose to reclassify broadband back to an information service.

In *Verizon*, the DC circuit laid out a path forward on how to construct a no-blocking rule without running afoul of the ban on common carriage. It suggested that a no-blocking rule would be permissible as long as there was some room for individualized bargaining above a minimum level of service.[21] However, that individualized bargaining could still be subject to FCC scrutiny under a commercial reasonableness standard.[22] We supported this type of no-blocking rule in 2014 and still believe that it would result in a strong, enforceable no-blocking rule that would ensure customers can access any content of their choosing at a reasonable speed.

CompTIA also still supports the "best effort" proposal in the 2014 NPRM for establishing a minimum level of service.[23] As long as all ISPs must provide their customers access to all legal online content at a sufficiently high level of service, there shouldn't be concern about blocking or throttling. This rule alone, however, would not address all net neutrality concerns, and thus the Commission would still have to craft a paid prioritization rule as well.

In 2014, the Commission proposed a rule prohibiting commercially unreasonable practices that "based on the totality of the circumstances, threaten to harm Internet openness and all that it

[19] Verizon, 740 F.3d at 628.
[20] TechAmerica Comments, GN Docket No. 14-28 (2014).
[21] *In re* Protecting and Promoting the Open Internet, GN Docket No. 14-28, para. 93 (rel. May 15, 2014).
[22] *Id*. at para. 97.
[23] *Id.* at para 102.

protects."[24] This rule would have worked in conjunction with the no-blocking rule to cover potentially harmful practices outside of blocking and throttling, such as anticompetitive paid prioritization arrangements, and to prevent such arrangements that would be harmful to consumers. Using this standard, the Commission could explicitly state that certain practices are commercially unreasonable per se, while other practices would be evaluated on a case-by-case basis.

Should the Commission choose to reclassify, they should model a new paid prioritization rule on the proposed rule in 2014, while also more-broadly banning commercially unreasonable practices that harm internet openness. The rule could ban such practices as giving prioritized treatment to an ISPs' own or affiliated content as well as exclusive prioritization agreements with edge providers by declaring these practices commercially unreasonable per se. While CompTIA supports allowing some level of commercial arrangements between ISPs and edge providers, the FCC must have rules in place to allow them to determine if any arrangements could harm consumers or rise to the level of anticompetitive behavior.

This rule would not have to be confined to just paid prioritization, however, and could function as a clearer, more targeted version of the general conduct standard in place today and prevent any ISPs from engaging commercially unreasonable behavior that threatens the Internet's openness.

These new rules governing blocking, throttling and paid prioritization would protect both consumers and online competition while promoting innovation.

V. Conclusion

CompTIA hopes that the FCC appreciates the importance of preserving an open internet and retains rules governing blocking, throttling, paid prioritization and other anti-competitive behavior online. The internet must remain a place where consumers can access whatever content they choose so that innovation can continue to flourish. It simply cannot become a place where the only content consumers can access is content created by those who can afford to pay ISPs for access to their customers.

[24] *Id.* at para. 116.